

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Patents

The owner of a patent covering a vapor permeation system brought an infringement claim against a competing manufacturer. Plaintiff sought a preliminary injunction prohibiting defendant from selling systems covered by the patent. Defendant did not argue that its vapor permeation system did not literally infringe plaintiff's patent. Defendant argued invalidity contending that the claimed technology was published more than one year prior to plaintiff's patent application, that the claimed invention was offered for sale more than one year prior to the filing date, that plaintiff failed to disclose the best mode for carrying out the invention, and that plaintiff engaged in inequitable conduct.

Chief Judge Hogan granted the motion for a preliminary injunction in light of the likelihood that defendant would not be able to shoulder its burden to establish invalidity. In light of the presumption of validity, plaintiff demonstrated a likelihood of success on the merits. Plaintiff also established irreparable harm due to the uniqueness of the technology and market, and the difficulty in measuring damages. Further, plaintiff established that the balance

of hardships favored it. Finally, Judge Hogan considered the impact to the public interest and found that the public interest would be better served by granting the injunction. Bend Research, Inc. v. Isotronics, LLC, CV 99-6021-HO (Order, July 7, 1999 - 19 pages).

Plaintiff's Counsel: Dennis Stenzel
Defense Counsel: Jonathan Hoffman

Employment

Judge Ann Aiken rejected defense attempts to overturn a jury verdict awarding a sexual harassment plaintiff \$18,000 in actual damages and over \$87,000 in punitive damages. The court applied the Supreme Court's recent Kolstad decision governing the level of intent required to support a punitive award under Title VII. Evidence at trial established that following plaintiff's complaints of sexual harassment against her supervisor, the defendant allowed the alleged harasser to continue to supervise the plaintiff without any security protection. The employer then used an instance in which the plaintiff used profanity as a basis for punishing her for her continued complaints about her supervisor. Further, the punishment meted out

to the plaintiff constituted an unprecedented 10 day suspension. Following this incident, plaintiff was then promoted to a position without training and with inadequate support staff. Finally, plaintiff proffered evidence that other women had also complained of sexual harassment and had similarly been terminated in retaliation for their complaints.

Judge Aiken also denied the defendant's alternative motion to reduce the punitive damage award. The court rejected a defense argument that backpay should be excluded when determining the ratio of actual to punitive damages. Once backpay was factored in, the ratio was 5:1 and well within a "constitutionally acceptable range" held the court. Further, the aggregate award still fell below Title VII's \$300,000 cap. Miller v. Albertson's Inc., CV 96-1457-AA (Opinion, July 19, 1999 - 13 pages).

In a separate opinion in Miller v. Albertson's Inc., Judge Aiken granted plaintiff's motion for attorney fees and costs and awarded approximately \$173,000 in fees and \$9500 in costs. This represented approximately 900 hours of attorney and paralegal time at rates of \$175-\$200/hour for the attorneys. Utilizing a lodestar analysis, the court found the rates and amounts sought reasonable

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given the complexity of the case and the extensive pretrial motion practice. The court rejected a defense objection to the specificity of plaintiff's billing records and found that, for example, entries like "trial preparation" were sufficient. The court declined to include 17 hours for time spent waiting for the verdict and rejected plaintiff's argument that this was necessary given that their office is located in Beaverton. (Opinion, July 19, 1999 - 11 pages).

Plaintiff's Counsel: Jack Oswald
Defense Counsel: Corbett Gordon

Q Application of the continuing violation doctrine was the central issue addressed in Judge Malcolm F. Marsh's recent decision in Haley v. Federal Express Corp., CV 98-1000. The plaintiff is a current employee of the defendant who claims that between 1994 and 1997 he was subjected to a racially hostile work environment and that in 1998 he was denied a promotion based upon his race. Plaintiff worked for three different supervisors between the years alleged. Defendant argued that all of the racially hostile work environment claims should be rejected as time barred since they involved discrete, unrelated activity, and that dismissal was appropriate on the merits. Plaintiff argued that all challenged actions should be considered under the continuing violations doctrine.

Judge Marsh found that there was some evidence of a linkage

between the second and third supervisors and held that these allegations were sufficient to create a genuine issue of fact as to whether any actionable conduct occurred within the two-years limitations period applicable to claims under 42 U.S.C. § 1981. However, the court found no connection to activity in 1994 and noted that plaintiff failed to even identify the relevant decision-maker. In reaching this conclusion, Judge Marsh rejected the defendant's argument that analysis of the continuing violation doctrine should differ for state claims under O.R.S. 659.

As for the merits, Judge Marsh rejected plaintiff's claim of a racially hostile work environment, finding that 3-5 stray remarks made over the course of a year failed to satisfy the "severe" or "pervasive" standard required under recent Supreme Court precedent. However, the court found that plaintiff had come forward with proof of disparate treatment relative to work assignments and staffing and denied defendant's motion on this narrowed basis. With the failure to promote claim, plaintiff came forward with evidence of a factual dispute regarding pretext.

Finally, the court granted the defense motion as against plaintiff's claim of intentional infliction of emotional distress. Judge Marsh noted the absence of any evidence of outrageous conduct within two years of his filing the action, and further explained the absence of any cited authority for extending the

continuing violations doctrine to state tort claims. (Opinion, July 26, 1999 - 18 pages).

Plaintiff's Counsel: Larry Sokol
Defense Counsel: Michael McGlory

7 Plaintiff, a white male 62-year-old Civil Service employee with the Indian Health Service, lost his job as a social worker during a reduction in force. Under the Civil Service regulations, a reduction in force can result in a long string of job changes during a convoluted process known as "bumping and retreating." Plaintiff alleged that he was discriminated against based on race, sex, and age when his position was targeted for elimination and during the reassignments in the bump and retreat process. Using a mixed case analysis, Judge King granted summary judgment after concluding that the Merit System Protection Board's decision upholding plaintiff's separation from federal service was lawful and that he did not suffer from disparate treatment discrimination under any of the three theories. Plaintiff also filed a disparate impact sex discrimination claim alleging that the requirement for a nursing degree and license in the Managed Care Coordinator position was discriminatory. Summary judgment was granted against this claim because plaintiff did not provide the court the proper statistics to establish his *prima facie* case. Foss v. Shalala, CV97-1577-KI, (Opinion, July 26, 1999).
Plaintiff's Counsel: William Goode

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Defense Counsel: Herbert Sundby

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